

CONGRESS, COMPACTS, AND INTERSTATE AUTHORITIES

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I

INTRODUCTION

Accommodation is the indispensable lubricant of a federal republic. Upon the ability of men of good will to accommodate federal and regional interests and to negotiate the differences that inevitably arise when sovereign states form a union which shall have ultimate claim to their allegiance, the Founding Fathers staked the survival of the Nation. A potent means of accommodating such conflicts between and among states and between states and the Federal Union is afforded by the interstate compact.

By the Articles of Confederation¹ and later by the Constitution, the American states accepted a self-imposed prohibition of the exercise of their prior power, as sovereigns, to enter into treaties with foreign governments and adopted a self-imposed limitation upon their prior power, as sovereigns, to enter into compacts with each other.² Thus, the Constitution specifically provides that³

No State shall, without the consent of Congress . . . enter into any agreement or compact with another State. . . .

In the intervening 185 years, the requirement of congressional consent has not prevented extensive resort to interstate compacts. Useful at first as a means of extending government authority to matters beyond the geographic reach of states, severally, and beyond the federal power because not specifically assigned to the federal government, these compacts have become a unique method for administering matters over which the federal and state power is concurrent, and where the states are free to act unless federal legislation has evidenced an intention to occupy the field.⁴

Over its life, the federal system has weathered numerous strains and federal-state relationships have been subjected to continuous scrutiny, review, and re-evaluation. Moreover, since 1937, the range of federal power has, by constitutional interpretation, been given broad sweep. In consequence, the areas in which state or multi-state

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¹ Art. VI, cl. 2, provided: "No two or more States shall enter into any treaty, confederation or alliance . . . without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."

² Cf. Leach, *The Federal Government and Interstate Compacts*, 29 *FORDHAM L. REV.* 421 n.1 (1961).

³ U.S. CONST. art. I, § 10, cl. 3.

⁴ WALLACE R. VAWTER, *INTERSTATE COMPACTS—THE FEDERAL INTEREST I* (1954).

action is the only available means of control have been sharply reduced. On the other hand, a growing need has been recognized for mechanisms to integrate areas such as river valleys and multi-state metropolitan areas, in which federal as well as state participation is strongly indicated.⁵ "The interstate compact is a strong legal instrument for expanding cooperative federalism in situations to which other cooperative methods are not as applicable."⁶

By the turn of the present century, there had been only twenty-one interstate compacts in all.⁷ These involved primarily boundary and other jurisdictional disputes. They either performed or provided for adjudication of single issues. Their consummation settled the problems which gave rise to them and they involved little or no continuing administration or attention. In the 1920's, however, the landmark Colorado River⁸ and Port of New York Authority⁹ compacts ushered in a new era of interstate and federal-state cooperation in the administration and development of regional resources.

Part II of the present article reviews the recently increasing federal role in interstate compacts, not only at the approval level, as required by the Constitution, but also at the levels of negotiation, administration, and most recently, full membership and participation.

In light of this growing trend toward federal participation in interstate compact formulation and administration, Part III describes the current impasse in which The Port of New York Authority, perhaps the greatest of our interstate compact agencies, seeks to bar congressional inquiry into its activities and operations on the classic ground that, as a "state agency," it is immune from federal investigation.¹⁰

II

THE FEDERAL ROLE IN INTERSTATE COMPACTS

A. The Requirement of Congressional Consent

The constitutional requirement of congressional consent to interstate compacts contains no limitation or exception, nor does it say in what manner the consent of Congress is to be sought or granted. In 1893, however, the Supreme Court had occasion to delineate the kind of compact that requires consent and the kind that is immune from the requirement. Though dealing primarily with implied consent, the case of *Virginia v. Tennessee*¹¹ enunciated a doctrine of "political balance" as the touchstone for determining the character of a compact in relation to the constitutional proviso. The Court held that the compact clause applies to compacts

⁵ FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, *THE INTERSTATE COMPACT SINCE 1925*, at 126 (1951).

⁶ *Ibid.*

⁷ RICHARD H. LEACH & REDDING S. SUGG, *THE ADMINISTRATION OF INTERSTATE COMPACTS* 5 (1959).

⁸ 45 Stat. 1057 (1928), 43 U.S.C. § 617 (1958).

⁹ 42 Stat. 174 (1921), 42 Stat. 822 (1922).

¹⁰ The reader is asked to bear in mind that the writer's responsibilities as Chairman of the House Judiciary Committee and of its Subcommittee No. 5 involve him directly on one side of this dispute, and also that pendency of litigation imposes a restraint not necessarily otherwise required.

¹¹ 148 U.S. 503 (1893).

"tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,"¹² stating that "There are many matters upon which different States may agree that can in no respect concern the United States."¹³

A recent judicial evaluation of the compact clause of the Constitution warrants quotation at length:¹⁴

"The authoritative commentary on the compact clause, Frankfurter and Landis, 'The Compact Clause of the Constitution—a Study in Interstate Adjustments,'¹⁵ indicates that the clause was the blend of several objectives. Principally, it was intended to provide a nonlitigious method for settlement of boundary disputes between States. It also provided authorization for other interstate 'political adjustments,'¹⁶ retaining to Congress the power to determine whether 'the national, and not merely a regional interest may be involved,' and to 'exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions.' As the authors summarized, 'The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments, but duly safeguarded the national interests.'¹⁷

"The cases which have interpreted the compact clause have confirmed these statements, and established that Congress has a two-fold duty: first, to prevent undue injury to the interests of noncompacting states;¹⁸ second, to guard against interference with the 'rightful management' by the National Government of the substantive matters placed by the Constitution under its control.¹⁹ Where the subject of an agreement between states is 'of merely local concern,' Congress has no responsibility under the clause;²⁰ but as the Supreme Court emphasized as recently as 1959, the duty of Congress to protect substantive federal interests such as interstate commerce and national defense in its action under the compact clause is a clear one."²¹

To this may be added the observation of Zimmerman and Wendell, that:²²

In some cases it is possible to explain the need for Congressional consent without invoking the political balance idea. It is, of course, necessarily true that compacts deal with interstate affairs. Consequently, it is more than likely that the subject matter of a compact will be within hailing distance of a power assigned to the national government by the Constitution. As the interstate compact becomes a device for regulation rather than

¹² *Id.* at 519.

¹³ *Id.* at 518.

¹⁴ Youngdahl, J., in *United States v. Tobin*, 195 F. Supp. 588, 606 (D.D.C. 1961).

¹⁵ 34 *YALE L.J.* 685 (1925).

¹⁶ *Id.* at 729.

¹⁷ *Id.* at 695.

¹⁸ See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 464, 513-14 (1838).

¹⁹ See, e.g., *Wharton v. Wise*, 153 U.S. 155, 169-70 (1894).

²⁰ *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 289 (1959) (Frankfurter, J., dissenting); *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893).

²¹ *Petty v. Tennessee-Missouri Bridge Comm'n*, *supra* note 20, at 282 n.7, 288-89 (dissenting opinion).

²² ZIMMERMAN & WENDELL, *op. cit. supra* note 5, at 36.

merely a mechanism for the settlement of interstate disputes, the need to reckon with the constitutional division of powers between states and nation becomes more obvious. In at least one instance (that of the New York Port Authority), possible collision with the federal commerce power was a conscious factor in the decision to use the compact form and so to gain the consent of Congress to the proposed cooperative enterprise.

With respect to the doctrine of implied consent, moreover, Zimmerman and Wendell point out²³ that *Virginia v. Tennessee*²⁴ was a case in which Congress had several times legislated concerning the subject matter of the compact there involved on the apparent assumption that the compact was operative, so that an implication of consent clearly arose. Whether mere passage of time would support a similar inference is open to question. Nevertheless, the doctrine and its possible expansion afford a better explanation for the growing tendency of Congress to condition its consent to compacts upon the insertion of safeguards of the federal interest than does congressional "hostility" to the compact principle ascribed by one writer.²⁵

Commentators have correctly observed that the requirement of congressional consent is a continuing one.²⁶ Since the compact clause imposes on Congress a constitutional responsibility to safeguard both national interests and the interests of non-compacting states, congressional power cannot be limited to passing on a compact in the first instance, alone. The power must also include ability subsequently to alter, amend, or repeal the consent that has been given.

This is so because administration of the compact may not be consistent with the purposes for which Congress has given its approval. Conditions change. As the Nation grows, the needs of one day are no longer the needs of another. Plans which do not adversely affect interstate commerce or the interests of other states at one time may, because of economic, political and social changes, have harmful results at a later time. The power to consent to an interstate compact must, therefore, carry with it the power to withdraw that consent.

The validity of this conclusion was recognized in principle by the Supreme Court as long ago as 1916 in *Louisville Bridge Company v. United States*.²⁷ In that case the appellant was the owner of a bridge, the design and structure of which

²³ *Id.* at 33-34.

²⁴ 148 U.S. 503 (1893).

²⁵ Leach, *supra* note 2, at 435, 433-36.

²⁶ *E.g.*, ZIMMERMAN & WENDELL, *op. cit. supra* note 5, at 64: ". . . the consent of Congress is just as necessary to the continuance of a compact as it is to its consummation . . . and no interstate agreement can remain in force without the continued approval or at least the neutrality of Congress"; VAWTER, *op. cit. supra* note 4, at 6-7: "The language of the Constitution is all-embracing. There can be little question that if the Congress chooses to act it can affirmatively prohibit or set conditions on the making of any class of interstate compacts or agreements (even including administrative agreements) if it decides that the national interest warrants such action. Although interstate compacts or agreements may have such practical effectiveness as the States choose to give them even lacking Congressional consent, they still remain within the power of the Congress under the categorical language of the compact clause." And see LEACH & SUGG, *op. cit. supra* note 7, at 15: "Although created by the States, compacts are indebted also to Congress for their existence since they are, according to the Constitution, the products of the combined legislative powers of Congress and the party state legislatures."

²⁷ 242 U.S. 409 (1917).

had been approved by an act of Congress. Many years later, changes in design and structure were required by Congress. The Court rejected the argument that the terms of congressional approval were irrevocable. It held that even in the absence of a specifically reserved right to alter, amend, or repeal, Congress, nevertheless, of necessity retains that right.

B. Manner of Conferring Consent

Whether or not all interstate compacts require the consent of Congress, the practice is to seek such consent. Usually, consent legislation takes the form of an act of Congress or joint resolution (requiring presidential approval)²⁸ setting forth and approving the text of the compact and adding provisions protective of the national interest.

Most, but not all compacts submitted to Congress have been approved. Two recent exceptions are the Southern Regional Education Compact and the Interstate Compact on Juveniles. The former of these was consented to by the House of Representatives,²⁹ but has never been approved by the Senate, possibly because it was not thought to require congressional consent. Nevertheless, the participating states have commenced operations under the compact.³⁰ In the case of the Interstate Compact on Juveniles, an impasse was created when the House Committee on the Judiciary conditioned its willingness to recommend consent to effectuation of the compact to those states which had already entered into it. This has not to date been acceptable to the proponents of the legislation. Here, too, however, the compacting states appear to be carrying out their program, despite failure to achieve congressional consent.³¹

In addition to the conventional method of consenting to a completed compact, Congress has sometimes invited state action with a view to the execution of compacts in furtherance of approved objectives, with the understanding that such compacts, when consummated, shall be submitted for approval.³² In rare instances, also, it has granted unrestricted consent in advance to compacts to be entered into by states.³³

The Civil Defense Act of 1951³⁴ strikes a balance between mere invitation to negotiate and blanket advance approval. It provides that civil defense compacts shall be filed with both Houses of Congress and shall be deemed to have the consent

²⁸ Approval of at least one interstate agreement, the Republican River Compact, was prevented by Presidential veto. See H.R. Doc. No. 690, 77th Cong., 2d Sess. (1942).

²⁹ 94 CONG. REC. 5407 (1948).

³⁰ See ZIMMERMAN & WENDELL, *op. cit. supra* note 5, at 39-40.

³¹ See Leach, *supra* note 2, at 433-34. The Northeastern Water and Related Land Resources Compact recently approved by the House (107 CONG. REC. 13340 (daily ed. Aug. 2, 1961)) provides that additional states may become parties by consent of Congress (H.R. 30, 87th Cong., 1st Sess. (1961)).

³² *E.g.*, 49 Stat. 1571 (1936), 33 U.S.C. § 701b (1958) (flood control); 49 Stat. 1240 (1936), 7 U.S.C. § 515 (1958) (tobacco control); 49 Stat. 1895 (1936); 16 U.S.C. § 17m, n (1958) (parks and parkways); 62 Stat. 1155 (1948), 33 U.S.C. § 456 (1958) (water pollution control).

³³ *E.g.*, 36 Stat. 961 (1911), 16 U.S.C. § 553 (1958) (forests and water supply); 48 Stat. 909 (1934), 48 U.S.C. § 438 (crime control); 73 Stat. 333 (1959), 49 U.S.C. § 1103a (1960 Supp.) (airport development).

³⁴ 64 Stat. 1249, 50 U.S.C. App. § 2281(g) (1951).

of Congress if not disapproved by concurrent resolution³⁵ within sixty days. This legislation accords such compacts a presumption of acceptability which it requires the prompt affirmative action of both Chambers to overcome.

Care is essential in granting approvals in advance. The entire financial history of The Port of New York Authority, for example, might have been very different had the consent of Congress been sought for concurrent legislation enacted by New York³⁶ and New Jersey³⁷ in 1930 and 1931. This legislation purported to free Holland Tunnel revenues from the requirement of cost amortization which had been imposed by the congressionally-approved Compact which initially authorized the construction of that facility. The story may be briefly told.

In 1919, New York³⁸ and New Jersey³⁹ authorized the appointment of commissions to cooperate in the construction and operation of a tunnel under the Hudson River between Jersey City and New York. The New Jersey legislation authorized the New Jersey Commission to agree with New York as to tolls.⁴⁰ The significant provision of the New York legislation declares:⁴¹

Tolls and charges for the use of such tunnel or tunnels shall be fixed at such amount as will pay the estimated cost of administration, maintenance, and operation, and in addition will pay within 20 years the amortized cost of construction.

By act of Congress approved July 11, 1919,⁴² Congress consented to the compact between New York and New Jersey authorized by the foregoing legislation. Pursuant to congressional approval thus granted in advance, the two States entered into a compact dated December 30, 1919, undertaking the joint construction of the proposed tunnel. Article XIV of the compact reads in part as follows:⁴³

1. Upon the completion of the construction of the tunnel or tunnels, pursuant to this agreement, the Commissions shall make reasonable rules and regulations and shall fix, determine and levy tolls and charges for the use of the same by vehicles and pedestrians, which tolls or charges are to be collected at the entrances to such tunnel or tunnels.
2. Such tolls or charges shall be fixed jointly by the Commissions, in such amount or amounts as will pay the estimated cost of administration, maintenance and operations and in addition thereto will pay within twenty (20) years the amortized cost of construction.

It thus appears that (1) the State of New York, in its authorization of the Holland Tunnel compact, provided that the cost of the projected facility should be amortized out of tolls; (2) Congress approved the proposed compact with this condition before it and incorporated the provision by reference, and (3) the compact of De-

³⁵ A concurrent resolution does not go to the President for approval.

³⁶ N.Y. Sess. Laws 1930, ch. 421; *id.* 1931, ch. 47.

³⁷ N.J. Laws 1930, ch. 247; *id.* 1931, ch. 4.

³⁸ N.Y. Sess. Laws 1919, ch. 178.

³⁹ N.J. Laws 1918, chs. 49, 50; *id.* 1919, ch. 70.

⁴⁰ N.J. Laws 1919, ch. 70, § 6.

⁴¹ N.Y. Sess. Laws 1919, ch. 178, § 9.

⁴² 41 Stat. 158 (1919).

⁴³ Compact of Dec. 30, 1919, as found in N.J. Laws 1920, ch. 76 (ratification of said compact).

ember 30, 1919, itself, specifically incorporated a provision for amortization of cost through tolls.

The Port of New York Authority came into existence with the enactment of congressional consent on August 23, 1921,⁴⁴ to a compact entered into in the same year by New York and New Jersey.⁴⁵ This compact, among other things, authorized the Port Authority to acquire and operate transportation facilities within the Port of New York District.⁴⁶ In 1930, to meet an impending default on Port Authority facility bonds, the two States transferred the Holland Tunnel, which had since become a profitable operation, to the Port Authority.⁴⁷ Finally, in 1931 the States unified the operation and control of all Port Authority bridges and tunnels "to the end that the tolls and other revenues therefrom shall be applied so far as practicable to the costs of the construction, maintenance and operation of said bridges and tunnels as a group" and "abrogated" inconsistent provisions of the congressionally-approved compact of December 30, 1919, pursuant to which the two States had constructed the Holland Tunnel under a commitment for twenty-year amortization.⁴⁸

The bi-State legislation of 1930 and 1931 was not submitted to Congress for approval. Its legality must therefore depend upon the scope of the congressional consent to The Port of New York Authority compacts of 1921 and 1922.⁴⁹ Unless those compacts and the congressional consents thereto can be read as repealing by implication the condition for cost amortization which was incorporated in the 1919 consent legislation, the financial structure of the Port Authority, with its heavy initial dependence upon the profitability of the Holland Tunnel, had a legally dubious origin.

C. Conditions on Consent

Increasingly, in recent years, Congress has included conditions in its legislative consents to interstate compacts in order to protect the national interest. Almost uniformly Congress reserves the right to "alter, amend, or repeal" its resolutions of consent, and such a reservation was included in both congressional resolutions consenting to the Port of New York Authority compacts of 1921 and 1922.⁵⁰

There is no legal necessity for such a reservation.⁵¹ The continuing responsibility of Congress with respect to interstate compacts that are instinct with federal interests can hardly be augmented by the inclusion of this reservation or reduced by its omission.⁵² Still, its inclusion serves notice that Congress does not intend to permit

⁴⁴ Ch. 77, 42 Stat. 174 (1921); a second compact was approved in ch. 277, 42 Stat. 822 (1922).

⁴⁵ N.Y. Sess. Laws 1921, ch. 154; N.J. Laws 1921, ch. 151. A second compact formulating a comprehensive plan of port development was entered into in 1922. N.Y. Sess. Laws 1922, ch. 43; N.J. Laws 1922, ch. 9.

⁴⁶ 1921 compact, art. VI, note 45 *supra*.

⁴⁷ See notes 36 and 37 *supra*.

⁴⁸ *Ibid.*

⁴⁹ See note 44 *supra*.

⁵⁰ See note 44 *supra*.

⁵¹ See *Louisville Bridge Co. v. United States*, *supra* note 27.

⁵² "In fact, it seems doubtful that a reserved right to alter, amend, or repeal adds any additional

the operations of the interstate compact to impair or injure the national interest.⁵³

Not uncommon, also, in cases in which the compact affects navigable waters, is a reservation of the authority and jurisdiction of the United States over the area and waters involved.⁵⁴ Beyond such explicit reservations of federal power, however, Congress has also conditioned its consent to operating compacts by a variety of limitations and restrictions.⁵⁵ One such device is a limitation on the duration of the consent, such as was imposed in the legislation consenting to the Interstate Oil Compact⁵⁶ and the Atlantic Marine Fisheries Compact.⁵⁷ In both instances the time limitation was implemented by requirements for reports. In the case of the Oil Compact, the Attorney General is now required annually to investigate and report to Congress as to whether the activities of the compact agency violates antitrust principles.⁵⁸ The Atlantic Fisheries Compact legislation also requires annual reports.⁵⁹ Apparently Congress initially desired to assure its own continued scrutiny of the operations of these compacts by making affirmative congressional action essential to their continued operation.

Another type of restrictive provision found in recent consent legislation limits the compact agency to the performance of the enumerated functions and requires congressional consent for each new or additional duty imposed on the agency by the compacting states.⁶⁰ In imposing this kind of restriction, Congress has doubtless been motivated by a desire to protect the exercise of its constitutional responsibilities against erosion by *fait accompli* and the possible application thereto of a doctrine of implied consent.⁶¹

power of regulation which Congress does not already have. Without such a reservation Congress could regulate bridges which it had approved. *Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917). The absence of the reservation does not avoid an ordinary regulatory power which Congress otherwise has; the presence of the reservation does not create an extraordinary Congressional power which Congress would not otherwise have." Brief for defendant in support of motion for acquittal in *United States v. Tobin*, 195 F. Supp. 588 (D.D.C. 1961) Cr. No. 986-60, p. 87.

⁵³ ". . . the reservations [in the Port of New York Authority consent resolutions] were not included in the compacts as an automatic, purposeless gesture; rather they reflect Congressional and Executive awareness of the port of New York's unique status in the nation's commercial life, and appreciation that a compact providing for comprehensive development of the port was charged with Federal interests." Youngdahl, J., in *United States v. Tobin*, 195 F. Supp. 588, 605 (D.D.C. 1961).

⁵⁴ *E.g.*, Port of New York Authority consent resolutions, note 44 *supra*.

⁵⁵ It is not practical for the consent legislation to attempt direct amendments of a compact because the concurrence of the compacting states is an essential element.

⁵⁶ 49 Stat. 939 (1935). The life of this compact was most recently extended to Sept. 1, 1963. See 73 Stat. 290 (1959).

⁵⁷ 56 Stat. 270 (1942). This time limitation was later repealed.

⁵⁸ 69 Stat. 391 (1955).

⁵⁹ 56 Stat. 270 (1942). A similar requirement affects the Pacific Marine Fisheries Compact, 61 Stat. 422 (1947).

⁶⁰ *E.g.*, Bi-State Development Agency Compact, 64 Stat. 568 (1950); Tennessee Valley River Basin Water Pollution Compact, 72 Stat. 828 (1958); Wabash Valley Compact, 73 Stat. 698 (1959). A similar provision appears in H.R. 30 (107 CONG. REC. 13340 (daily ed. Aug. 2, 1961)) which would consent to and approve the Northeastern Water and Related Land Resources Compact.

⁶¹ See text at note 23 *supra*. In this connection it may be noted that no specific congressional consent was ever given to the Port of New York Authority to operate airports. Nevertheless, the Authority's present investment in airports exceeds \$366 million. [1960] PORT OF NEW YORK AUTHORITY ANN. REP. 2.

Further evidence of a quickening determination by Congress to protect the federal interests affected by the activities of modern interstate authorities is the reservation, found in recent consent legislation, of the right of Congress and its committees to require disclosure by the compact agency of such data and information as is deemed appropriate.⁶² Here, even more clearly than in the reservation of the power to modify or withdraw consent to compacts, the inclusion of the provision is not legally necessary to the accomplishment of the desired result. Manifestly, Congress has the power, in aid of legislation, to make all pertinent inquiries into the operation of compact agencies whose activities affect substantial federal interests.⁶³ Expression of the reservation is beneficial, nevertheless, because it places non-federal participants on notice that Congress intends adequately to inform itself, should occasion arise.

D. Federal Participation in Compact Negotiations and Administration

Indicative of the federal government's growing interest in the operation of interstate compacts and compact agencies is its widespread participation in the negotiation of compacts and in their administration. Note has already been taken of instances, in the nature of advance approval, in which Congress has instigated and encouraged the negotiation of interstate compacts.⁶⁴ In addition to this kind of encouragement, the federal government often assigns personnel to participate and represent the Government in the formulation of compacts, particularly in the area of water conservation. Writing in 1954, Vawter stated:⁶⁵

There have been only ten instances of legislation authorizing compacts relating to river management in connection with whose negotiation appointment of a Federal representative has not been required. In the past fifteen years there have been only four compacts out of nineteen authorized or consented to dealing with river development and management in whose negotiation no Federal representative participated.

The Federal representative has frequently served as impartial chairman of the compact negotiating group, a useful role where all other parties usually have a more direct or competitive interest in the negotiations than the Federal Government. In conducting the best handled of the past negotiations it has been customary for the Federal representative to secure a wide amount of participation by interested Federal agencies. Timely presentation of particular agency viewpoints to the negotiators has avoided later difficulties in obtaining consent to the compact.

Two years later, President Eisenhower transmitted to the House of Representatives the *1955 Report of the Presidential Advisory Committee on Water Resources Policy*, with a letter of endorsement in which he stated:⁶⁶

⁶² Such reservation appears in the legislation consenting to the Wabash Valley Compact, 73 Stat. 699 (1959); the New York-New Jersey Transportation Agency Compact, 73 Stat. 575 (1959); and the Washington Metropolitan Area Transit Regulation Compact, 74 Stat. 1021, 40 U.S.C. § 651 note (1960 Supp.). Similar provision is made in the pending resolution that would grant consent to the Delaware River Basin Compact. H.R.J. Res. 225, 107 CONG. REC. 11000 (daily ed. June 29, 1961).

⁶³ *United States v. Tobin*, 195 F. Supp. 588 (D.D.C. 1961).

⁶⁴ See notes 32-34 *supra*.

⁶⁵ VAWTER, *op. cit. supra* note 4, at 15.

⁶⁶ H.R. Doc. No. 315, 84th Cong., 2d Sess. (1956).

Set forth in the report is a pattern for the widest possible public participation in water resources projects. Organizational changes are recommended to coordinate more closely Federal and non-Federal activity and to make possible more effective executive guidance. The intent of these proposed changes is to provide the States and local water resources agencies a more adequate voice in the planning and development of projects and facilitate joint participation by all of the affected Federal interests. By this type of cooperative effort we should be assured that all possible uses of water are adequately considered.

In the same year the Bureau of the Budget formulated a *Guide to Federal Participation in Interstate Compact Negotiations*. Declaring that interstate water compacts are to be encouraged so long as national interests are protected, this document sets out in detail the role of the federal representative, the relations to be maintained by him with interested federal agencies, and certain reporting requirements.⁶⁷ In addition, federal research facilities are often put at the disposal of the negotiators, and Congress frequently consults the interested federal agencies in connection with its consideration of consent legislation.⁶⁸

Even after approval and consummation of interstate compacts, federal participation often continues. As to this, Vawter reported that federal members or representatives are to be found on fourteen operating compact agencies.⁶⁹ More recently, the *Report of the House Committee on the Judiciary on the Delaware River Basin Compact Consent Legislation* stated that eighteen out of thirty operating interstate compact agencies have federal representatives.⁷⁰ Included in this category are the recent Tennessee Valley River Basin Water Pollution Control Compact⁷¹ and the Wabash Valley Compact.⁷² What is more, the federal members of at least four important compact agencies have voting power:

- (1) the Ohio River Valley Water Sanitation Compact⁷³ has three federal representatives—all voting members;
- (2) the Upper Colorado Basin Compact⁷⁴ provides for a federal representative who also votes and is the presiding officer of the compact agency;
- (3) there are three voting federal representatives on the Potomac River Basin Compact Agency;⁷⁵
- (4) in the Yellowstone River Compact⁷⁶ agency, the federal representative serves as a tie-breaker.

⁶⁷ See *Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary on H.R.J. Res. No. 225, to consent to the Delaware River Basin Compact*, 87th Cong., 1st Sess. 70 (1961).

⁶⁸ See, e.g., H.R. REP. NO. 1767, 86th Cong., 2d Sess. (1960); H.R. REP. NO. 707, 87th Cong., 1st Sess. (1961) (Northeastern Water and Related Land Resources Compact); S. REP. NO. 1864, 86th Cong., 2d Sess. (1960) (Arizona-Nevada Boundary Compact).

⁶⁹ VAWTER, *op. cit. supra* note 4, at 21.

⁷⁰ H.R. REP. NO. 310, 87th Cong., 1st Sess. 13 (1961).

⁷¹ 72 Stat. 823 (1958).

⁷² 73 Stat. 694 (1959).

⁷³ 54 Stat. 752 (1940), 33 U.S.C. § 567a note (1958).

⁷⁴ 63 Stat. 31 (1949), 43 U.S.C. § 617l (1958).

⁷⁵ 54 Stat. 748 (1940), 33 U.S.C. § 567b (1958).

⁷⁶ 65 Stat. 663 (1951).

E. The Federal Government as a Full Compacting Partner

Two proposed compacts recently approved by the House of Representatives, of which one is now pending in the Senate and the other has been enacted into law, mark a new departure in compact structure in that the United States would not only consent and assign voting members to the compacts, but would effectually become a member of the compacts and a full-fledged partner in the compact agencies.

In the case of the Northeastern Water and Related Land Resources Compact,⁷⁷ this is done by providing for six state members (one from each of the New England states) and seven federal members (one from each of seven interested federal agencies) and by requiring concurrence of a majority of the state members and a majority of the federal members for affirmative action.⁷⁸

In the case of the Delaware River Basin Compact,⁷⁹ membership on the Authority is to comprise four state representatives (one from Delaware, New Jersey, New York, and Pennsylvania) and one federal representative, each with one vote.⁸⁰ Notably, in the congressional resolution approving the Delaware River Basin Compact, the United States not only consents to but also joins in the compact,⁸¹ and the Report of the House Judiciary Committee accompanying the resolution speaks of the proposed arrangement as a "Federal-Interstate Compact."⁸² Zimmerman and Wendell, writing in 1951,⁸³ observed that the concept of a federal-state compact had been advanced as early as 1945, when Professor McDougal of Yale suggested the establishment of a "New England Regional Development Administration" which would be set up both by interstate compact and as a federal public corporation. In this connection, these authors pointed to examples in which compacting states have conditioned their agreements upon the adoption of specific principles by Congress, which conditions Congress met, and to examples (including the Port of New York Authority Compact)⁸⁴ in which the compact provides that the compact agency may exercise powers granted to it by Congress.⁸⁵

III

THE PORT OF NEW YORK AUTHORITY IMPASSE

A. Background of the Judiciary Committee's Investigation

In an incomprehensible rejection of the pronounced national trend toward federal-state collaboration in the interstate compact area, the Port of New York

⁷⁷ H.R. 30, 107 CONG. REC. 13340 (daily ed. Aug. 2, 1961); House Comm. on Public Works, *Granting the Consent and Approval of Congress to the Northeastern Water and Related Land Resources Compact*, H.R. REP. No. 707, 87th Cong., 1st Sess. (1961).

⁷⁸ *Ibid.*

⁷⁹ Act of Sept. 27, 1961, 75 Stat. 688.

⁸⁰ 75 Stat. 691.

⁸¹ 75 Stat. 689.

⁸² House Comm. on the Judiciary, *Delaware River Basin Compact*, H.R. REP. No. 310, 87th Cong., 1st Sess. 3 (1961).

⁸³ ZIMMERMAN & WENDELL, *op. cit. supra* note 5, at 60-61.

⁸⁴ The Port of New York Authority Compact of 1921, art. II; see 52 Stat. 174 (1921).

⁸⁵ For a brief supporting the constitutionality of the Federal-State compact, see *Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary on H.R.J. Res. 225, to consent to the Delaware River Basin Compact*, 87th Cong., 1st Sess. 26 (1961).

Authority now declines to comply with congressional committee subpoenas seeking production of documentary evidence concerning that agency's activities and operations.

The Port Authority is an interstate, regional development authority established under compacts between New York and New Jersey, approved by Congress in 1921⁸⁶ and 1922,⁸⁷ for the purpose of planning and developing terminal and transportation facilities and improving commerce in the Port of New York District. It was the declared intention of Congress that the effectuation of these compacts would "better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation."⁸⁸ The operations of the Authority exercise a far-flung influence on interstate commerce. At the time of its 1959 *Annual Report*, the Port Authority was operating "twenty-one terminal and transportation facilities; six inter-state bridges and tunnels; four air terminals and a heliport; six marine terminal areas; two union motor truck terminals; a motor truck terminal for rail freight; and a union bus terminal."⁸⁹ The Authority's investment in these facilities now exceeds one billion dollars and its gross operating revenue exceeds one hundred million dollars annually.⁹⁰

These operations of the Port Authority affect the lives of millions of Americans living outside as well as inside the port development area and the States of New York and New Jersey. They affect the operations of federal agencies responsible, among other things, for the national defense, navigable waterways, and air and surface traffic. In short, they substantially affect federal interests of many and varied kinds. Yet, although Congress, in its consent legislation, specifically reserved the power to alter, amend, or repeal its consent to the compacts,⁹¹ prior to 1960 no congressional committee had ever conducted a general investigation of the Port of New York Authority to determine its conformance or non-conformance to the limits of its authority or the extent or adequacy of its performance of responsibilities in the public interest.

It should be noted that early in the Authority's life and again as recently as 1952, its public statements reflected full recognition of its accountability to Congress as the repository of significant federal interests. Thus the progress report of the Authority, dated February 1, 1923, stated:⁹²

The comprehensive plan [of Port development] is now legally authorized by the two States and the Congress of the United States and *the police power of the States and the interstate commerce power of the Congress are joined in effectuating the definite plan, with one coordinating body as the State and Federal instrumentality.*

⁸⁶ 42 Stat. 174 (1921).

⁸⁷ 42 Stat. 822 (1922).

⁸⁸ *Ibid.*

⁸⁹ 1959 PORT OF NEW YORK AUTHORITY ANN. REP. at v.

⁹⁰ 1960 PORT OF NEW YORK AUTHORITY ANN. REP. 61.

⁹¹ See notes 86 and 87 *supra*.

⁹² PORT OF NEW YORK AUTHORITY, PROGRESS REP. 8. (Emphasis added.)

In the following year, in the course of hearings before the House Committee on Military Affairs on the acquisition by the Authority of the Hoboken shoreline from the Secretary of War, the following colloquy occurred:⁹³

Mr. EAGAN. Do you contend that the Port of New York Authority in any sense is a Federal agency or instrumentality of the Federal Government?

Mr. COHEN [counsel for the Port of New York Authority]. It is for the purpose of effectuating the comprehensive plan, Congress having directed the port authority to effectuate it. We went further than that in the hearing before the Senate committee, and I shall submit all of that hearing as a part of this record.

Later, Mr. Cohen amplified this answer, saying:

Now, with regard to this question here that Congressman Eagan has put, in our arguments with the railroads we have taken the position that when this comprehensive plan has approval by the two States it would not be effective as a regulation of interstate commerce until it was approved by the Congress of the United States, but that when it was approved by the Congress of the United States it was a Federal regulation of the commerce so far as these improvements were to be made in the port district, and that the port authority was the instrumentality, in that sense of the Federal Government, for the purpose of effectuating the comprehensive plan. . . .

Thereafter Congressman Eagan stated:

I should like to ask Mr. Cohen whether or not I correctly understood him to say, in answer to my question of yesterday, that he considered the Port of New York Authority an agency or instrumentality of the Federal Government?

Mr. Cohen replied:

For the purpose of effectuating the comprehensive plan we are a Federal Agency. . . .

Before the Senate Committee, similar representations were made. Mr. Cohen said that the ". . . plan involving interstate commerce, and the question of navigation and improvement of military roads and highways, and therefore necessitating approval by Congress, it was approved by Congress, so we are effectuating a Federal purpose, and in that sense we may be called a Federal instrumentality. . . ."⁹⁴

Also, in 1924 in an amicus curiae brief filed with the Supreme Court of the United States, in *City of Newark v. Central Railroad of New Jersey*,⁹⁵ the port authority asserted as black letter law the following proposition:⁹⁶

There can be no doubt that Congress has made the port authority its agent for the effectuation of the comprehensive plan.

Finally, in 1952, at a hearing before a subcommittee of the House Judiciary

⁹³ *Hearings Before the House Committee on Military Affairs on S. 2287 and H.R. 7014*, 68th Cong., 1st Sess. 7, 55 (1924).

⁹⁴ *Hearings Before the Senate Committee on Military Affairs on S. 2287*, 68th Cong., 1st Sess. 34 (1924).

⁹⁵ 267 U.S. 373 (1925).

⁹⁶ 267 U.S. 377 (1925).

Committee, Mr. Austin J. Tobin, Executive Director of the Port Authority, testified:⁹⁷

As a public agency the Port Authority has always taken the position that its books and records are public information. On April 22, 1952, I wrote the chairman of this committee as follows:

"The commissioners of the Port Authority have also asked me to assure you of their desire to place at the disposal of your committee whatever records, information, data, or other material which may be helpful to your staff in preparation for the hearings on this resolution. The Port Authority is a public agency and our records are completely available for perusal by the members of your committee or your staff."

In early 1960, complaints varying in character and gravity concerning the operations of the Port Authority came to the attention of the House Committee on the Judiciary. Reiterating recurring charges of absence of democratic controls,⁹⁸ a fault that is sometimes ascribed to interstate compacts generally,⁹⁹ these complaints included allegations, among others:

(1) that the policy of the Authority in combining revenues for financing purposes from all its facilities rather than reducing tolls on each facility as it is amortized unduly burdens the channels of interstate commerce and is contrary to the national transportation policy;

(2) that certain activities of the Authority unjustifiably discriminate against certain types of interstate carriers;

(3) that the Authority has extended its operations beyond the geographic limits contemplated by Congress;

(4) that the Authority has let certain contracts without permitting competition and has failed to grant the award to the lowest qualified bidder; and

(5) that the overall operations of the Authority have never been subjected to a comprehensive independent audit by any government agency.

In these circumstances, and at the request of members of the New Jersey Congressional Delegation, the staff of the House Judiciary Committee was directed to

⁹⁷ *Hearings Before a Special Subcommittee of the House Committee on the Judiciary on H.R.J. Res. 375, 82d Cong., 2d Sess. 346 (1952).*

⁹⁸ See, e.g., *New Strength in City Hall*, *Fortune*, Nov. 1957, pp. 156, 256, to the effect that the Port Authority "does not make its decisions to build another tunnel, or to expand an airport instead of investing in mass-transit facilities, in terms of the whole public, or of the interest of the whole area. . . . It makes its decisions in terms of its own, more limited public—*i.e.*, the auto driver who keeps it going with his tolls, and the bond market. The N.Y.P.A. . . . like many another authority, ostensibly 'non-political,' has developed a politics of its own, a politics of specialists, who may or may not be responsive to the public interest."

⁹⁹ Ross D. Netherton, in a recent article calling upon both Congress and the States to re-examine their laissez-faire attitude toward area development authorities, stressed the virtual autonomy of these instrumentalities: "[T]he Parent States have bound themselves not to exercise the means of regulation in the public interest which are generally applicable to public agencies. The taxpayer-voter is completely out of the play. Not only are his civic functions paralyzed when he is cast in the role of the consumer of services rendered by the authority and financed through revenue bonds, but even when he has a chance to vote or sue, he lacks coherent information on the basis of which to make up his mind." Netherton, *Area Development Authorities—A New Form of Government by Proclamation*, 8 *VAND. L. REV.* 678, 691 (1955).

make a study of the activities and operations of the Port Authority under the congressionally-approved compacts, and the writer, as Chairman, requested the Executive Director of the Port Authority to make certain of the Authority's files available for examination by the staff.

B. The Refusal to Produce Files

In response to the writer's request, Mr. Tobin supplied documents which were already matters of public record, but withheld others deemed vital to the investigation. Against this background, Judiciary Subcommittee No. 5 voted, on June 8, 1960, to begin a full inquiry into the activities and operations of the Port Authority "to determine whether . . . legislation is necessary in respect to the interstate compacts creating the . . . Authority," and "to ascertain (1) whether or not [the Authority] has exceeded the scope of its activities as contemplated by Congress in approving the interstate compacts of 1921 and 1922; and (2) the extent to which the Authority is carrying out its duties and responsibilities under these interstate compacts."¹⁰⁰ On the same day the Subcommittee notified Mr. Tobin of its action and the purpose thereof, and requested the Port Authority to make specified documents available.¹⁰¹ Mr. Tobin replied by letter dated June 10, 1960. He detailed the material which the Authority had already furnished and stated that because the Authority was a "state agency" and because the requested documents related "solely to the internal administration" of the Authority, they could not assist in any valid purpose of the committee and were not pertinent to its stated purpose.¹⁰² He added that an investigation of the type proposed would inhibit the states in their use of the interstate compact device.

Subpoenas duces tecum calling for production of the specified documents were served upon Mr. Tobin as Executive Director of the Port Authority and also on the Chairman of its Board of Commissioners and their Secretary. At the return of the subpoenas, on June 29, 1960, each such official appeared, offered to testify without qualification, and produced documents already of public record. Each declined, however, to produce the contested documents,¹⁰³ asserting that the Governors of New York and New Jersey had instructed them so to decline. Identical letters from Governors Rockefeller and Meyner to members of the Port Authority Board of Commissioners directing that the documents not be made available to the Com-

¹⁰⁰ *Proceedings Before Subcommittee No. 5 of the House Committee on the Judiciary on the Return of Subpoenas Duces Tecum issued to S. Sloan Colt, Joseph G. Carty, and Austin J. Tobin in the Port of New York Authority Inquiry*, 86th Cong., 2d Sess. 14-15 (1960) [hereinafter cited as *Proceedings on Return of the Subpoenas*].

¹⁰¹ *Ibid.*

¹⁰² *Id.* at 16-19.

¹⁰³ The documents called for by the subpoenas but withheld from the Committee's scrutiny are: internal financial reports and management and financial reports prepared by outside consultants; agenda of meetings and reports to the Commissioners by members of the executive staff; and all communications relating to (a) construction, insurance, and public relations contracts, (b) acquisition, leasing, and transfer of real estate, (c) negotiation and issuance of revenue bonds, and (d) rail transportation development policies.

mittee were received in evidence. They stressed the rights of the states under the reserved powers clause of the Constitution and indicated a desire to have the constitutional issues "determined by the appropriate tribunal."¹⁰⁴

Thereafter the three Port Authority officials were declared to be in default.¹⁰⁵ On June 30, acting on the unanimous recommendation of its Subcommittee, the Committee on the Judiciary voted to report the contumacious refusal of the witnesses to the House, and on August 23, after extensive debate the House voted approval of three separate reports recommending citation of the Port Authority officials for contempt.¹⁰⁶

The resolutions adopted by the House¹⁰⁷ were duly certified by the Speaker to the United States Attorney for the District of Columbia pursuant to section 194 of title two of the United States Code. On November 25, 1960, an information was filed against Mr. Tobin, but not against the other two officials.

C. The November-December 1960 Hearings

Meanwhile, the Subcommittee's investigation continued. Because of the Port Authority's refusal to make its files available, however, the Subcommittee was forced to conduct its inquiry largely by examination of the files and records of enterprises doing business with the Port Authority and, at great effort and expense, to piece together information that would otherwise have been available in the Port Authority documents requested by but withheld from the Subcommittee. Indeed, there are important areas in which, as the result of the position taken by the Port Authority officials in withholding records of the agency, the Subcommittee has been wholly prevented from carrying out its legislative responsibilities. Nevertheless, within the limitations imposed on the investigation by the Port Authority's failure to cooperate, the Subcommittee held five days of preliminary hearings from November 28 through December 2, 1960, on a number of important matters.

For the purpose of this article, the primary significance of these preliminary hearings is that they confirmed the judgment of the Subcommittee at the return

¹⁰⁴ *Proceedings on Return of Subpoenas* 39-41. The Subcommittee heard argument from the Attorneys General of New York and New Jersey and also afforded the Governors every reasonable opportunity personally to present their views. After vainly seeking an earlier meeting, the Subcommittee suggested a meeting to be held on August 8. Governor Rockefeller replied that he would not be free to meet with the Subcommittee until after August 29, by which time the House would already have adjourned. Governor Meyner first stated that he could make himself available on August 8, but later declined to meet with the Subcommittee unless Governor Rockefeller were also present.

¹⁰⁵ The three Port Authority officials were accorded scrupulous procedural fairness: all nine members of the Subcommittee attended at the return of subpoenas; the Chair at the outset apprised the witnesses of the purpose and scope of the investigation and the need therefor and gave a detailed explanation of the pertinency to the inquiry of each category of documents demanded by the subpoenas; the witnesses were accompanied by and were permitted to confer with counsel and other members of the Port Authority staff and to express any opinion or offer any statement for the record; they were also afforded a recess in which to confer with counsel.

¹⁰⁶ *Proceedings Against Austin J. Tobin*, H.R. REP. NO. 2117, *Proceedings Against S. Sloan Colt*, H.R. REP. NO. 2120; *Proceedings Against Joseph G. Carty*, H.R. REP. NO. 2121, all 86th Cong., 2d Sess. (1960), reprinted in 106 CONG. REC. 16059-16103 (daily ed. Aug. 23, 1960).

¹⁰⁷ H.R. 606, 607, 608, 86th Cong., 2d Sess. (1960).

of the subpoenas on June 29, in insisting on compliance with the demand for the production of internal documents and in refusing to accept documents of public record and the oral testimony of Mr. Tobin and his associates as a substitute.

As the Supreme Court stated in *McGrain v. Daugherty*:¹⁰⁸

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing and also that *information which is volunteered is not always accurate or complete*; so some means of compulsion are essential to obtain what is needed.

The November-December hearings offer many instances in which oral testimony without documentary evidence and formal reports without underlying staff memoranda would have been patently inadequate to the purposes of the investigation. A few of these may be recounted:

(1) Mr. Tobin's recollection concerning the Port Authority's use of a patronage system of paying insurance commissions to a broker who did not perform any work was faulty until refreshed at the hearings by documents from the files of the Authority's insurance agency.¹⁰⁹

(2) At the hearings, Mr. Tobin first specifically denied, then conceded when confronted by contemporary documents taken from non-Port Authority files, that the Transportation Advisor to the Governor of New York had originally proposed that the Port Authority be required to finance the purchase of some \$200 million's worth of rail commuter cars.¹¹⁰ Mr. Tobin first insisted that he had not appealed to investment bankers to persuade the Governor that this proposal was inadvisable, but when a letter was produced showing that he had done exactly that, he admitted that he had done so.¹¹¹

(3) Mr. Tobin and financial officers of the Port Authority testified at length that it would be impossible to prepare a capital account for each Authority facility showing operating expenses against gross revenues. They based this on the asserted impossibility of allocating debt service cost on each facility. Yet a document secured from the Corps of Engineers revealed that the Port Authority had supplied that body precisely the type of data sought by the Subcommittee for the George Washington Bridge for 1931-1932, including a "total computed annual debt service" that it had been testified was impossible to compute.¹¹²

¹⁰⁸ 273 U.S. 135, 174 (1927). (Emphasis supplied.)

¹⁰⁹ *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary on the Port of New York Authority*, 86th Cong., 2d Sess. 1171-89 (1960) [hereinafter cited as *Hearings*].

¹¹⁰ *Id.* at 27-58.

¹¹¹ *Id.* at 30-31.

¹¹² *Id.* at 1543-53. A Port Authority witness testified that the computed debt service had been based on assumptions, but no such explanation was provided until the document was called to the witness' attention.

Another disclosure of the November-December hearings was that the Port Authority's 1960 budget for public relations was \$326,000.¹¹³ It was noted that the \$15,000 cost of a single telegram from Governor Rockefeller and three former Governors of New York to all members of the House, urging them to vote against the contempt resolutions,¹¹⁴ was not charged to the public relations budget but was defrayed out of the Executive Director's separate budget.¹¹⁵

D. The Issues Litigated—*United States v. Tobin*

In January 1961, the information against Mr. Tobin charging him with contempt came on for trial in the United States District Court for the District of Columbia before Judge Luther Youngdahl, sitting without a jury. On June 15, the court rendered its decision finding Mr. Tobin guilty as charged. Judge Youngdahl's scholarly opinion merits careful study by all students of federal-state relationships. It is here summarized for its illumination of the issues and of the legal and constitutional status of the Port of New York Authority.

At the outset, the court disposed of the defendant's contention that the Subcommittee was not authorized to conduct an investigation in which it could call for the documents in issue. The court noted that the Reorganization Act of 1946 gives the Judiciary Committee jurisdiction over "interstate compacts generally"¹¹⁶ and that H.R. Res. No. 530, adopted by the House on June 1, 1960,¹¹⁷ perfected the Subcommittee's authorization to conduct full investigations of the activities and operations of interstate compacts, using the subpoena power if necessary. On the basis of the text of this resolution and the floor discussion attendant on its adoption by the House, the court found "that it was the clear import of the June first resolution that the Judiciary Committee¹¹⁸ be authorized to conduct an investigation that could encompass the request for the subpoenaed documents . . . at issue."¹¹⁹

In light of constitutional requirements that a congressional committee witness be given a clear explanation of the subject matter under inquiry and the pertinency thereto of the requested information,¹²⁰ the court next examined and validated the

¹¹³ *Hearings* 2047.

¹¹⁴ *Id.* at 2048. The unique posture of the "States' rights" issue in the House debate impelled Representative Colmer of Mississippi to remark: "I do not think there is anything that has come before this short bobtail session of the Congress that will give me as much pleasure and gratification as the matter now before us. I was one of those, I am sure everybody else did, too, who received this telegram that has been alluded to by the distinguished gentleman from Michigan [Mr. MEADER] from the Governor of New York, Mr. Rockefeller, and his immediate predecessors, Mr. Harriman, Mr. Dewey, and Mr. Lehman, all urging me on behalf of States rights to oppose this citation. In this contest I find myself in the position of the man watching a fight between his wife and a bear. I do not much care which way it goes; I am just glad to see the fight. I am happy that so many are in favor of States rights in the great States of New York and New Jersey today." 106 CONG. REC. 16087 (daily ed. Aug. 23, 1960).

¹¹⁵ *Hearings* 2048.

¹¹⁶ Standing Rules of the House of Representatives, rule XI, § (1)(L)18, 60 Stat. 827 (1946).

¹¹⁷ 86th Cong., 2d Sess. (1960), amending H. Res. 27, 86th Cong., 1st Sess. (1960).

¹¹⁸ The effective delegation of the Judiciary Committee's power, such as it might be found to be, to Subcommittee No. 5 was stipulated.

¹¹⁹ *United States v. Tobin*, 195 F. Supp. 588, 600 (D.D.C. 1961).

¹²⁰ *Watkins v. United States*, 354 U.S. 178 (1957).

Subcommittee's procedure in these respects.¹²¹ Judge Youngdahl held that the Subcommittee Chairman's opening statement, read to Mr. Tobin at the return of subpoenas, "made indisputably clear the subject matter of the investigation."¹²² Its ultimate purpose, so the court found, was¹²³

to determine whether legislation to alter, amend, or repeal the Congressional resolution of consent to the compacts might be desirable in order to protect the Federal interests involved.

Similarly, the court found that the Government had proved beyond a reasonable doubt that the Subcommittee's extensive and detailed explanation of the pertinency of the requested documents was sufficient to meet requirements of due process, and also that the documents were legally pertinent. Rejecting the contention that the Subcommittee's pertinency statement failed to spell out in detail the federal interests which the Authority's operations might be affecting and the way in which the subpoenaed documents might reveal this, Judge Youngdahl noted that the investigation was to a degree exploratory. He wrote:¹²⁴

To say that [the Subcommittee] was required to delineate with ultimate precision the particular elements of Federal interests which the inquiry might reveal to be adversely affected would be to require the committee, in effect, to have stated its subject in the narrow terms of the conclusions it might later reach. This was obviously impossible.

In his brief, Mr. Tobin had challenged the validity of the Subcommittee's stated purpose in conducting the investigation. The court reviewed the reservations to the congressional resolutions of consent in light of the Port Authority's activities and in light of the compact clause¹²⁵ and concluded that the power of Congress to legislate pursuant to the reservations is "coextensive with any threat to national interests caused by activities of the Authority."¹²⁶ It was sufficient, the court held, that such threats might be uncovered by the investigation, which was justified as groundwork for valid congressional action. Mr. Tobin had also contended that the Subcommittee's stated purpose was not its real purpose but concealed a real and improper purpose of punishment of the Authority and its officials. As to this issue, the court found that the Subcommittee's true purposes were those stated by it; that their propriety was substantial; and that the inquiry itself had, in effect, been voted by the full House.¹²⁷

Judge Youngdahl next addressed himself to contentions that the documents withheld from the Subcommittee were privileged. The argument was made that Port Authority documents comprising communications to and from the Governors of New York and New Jersey and their staffs should be immune from con-

¹²¹ *United States v. Tobin*, *supra* note 14, at 600-05.

¹²² *Id.* at 601.

¹²³ *Id.* at 602.

¹²⁴ *Id.* at 603.

¹²⁵ *Id.* at 605.

¹²⁶ *Id.* at 606.

¹²⁷ *Id.* at 608.

gressional subpoena under a doctrine of "executive privilege." However, the court found it unnecessary to resolve this issue because, as it found, the defense of special gubernatorial privilege had never been properly raised before the Committee.¹²⁸

The defendant had also urged that documents prepared and circulated solely among the Authority staff and commissioners and confidential reports to the Authority from outsiders should be immune. Weighing the interest of the Port Authority in secrecy against the need of the Subcommittee for information essential to its inquiry, Judge Youngdahl held that the balance must be struck in favor of disclosure. That there is no overwhelming need to keep the subpoenaed documents secret, he found, is indicated by Mr. Tobin's 1952 offer to place all Port Authority records at the disposal of a Judiciary Subcommittee,¹²⁹ and also by Mr. Tobin's admission at the trial that in connection with a recent inquiry by a New Jersey legislative committee, he was, without invoking privilege,¹³⁰

producing every paper in the Port Authority that the Commission [sic] asks for. They are entitled to every scrap of paper and every memorandum and everything we have . . . [w]ithout exception.

Further, Judge Youngdahl found unpersuasive the defendant's contention that enthusiasm for the compact device would be dampened if Congress is afforded access to documents such as those subpoenaed, pointing to the fact that New York and New Jersey had entered into another compact as to which Congress had reserved the right to subpoena such documents.¹³¹ The court also found that oral testimony and documents already available to Congress could not convey a complete picture of the Authority or provide adequate basis for potential legislation, basing its conclusion in part on the experiences at the November-December hearings,¹³² described in Part III C, above.

Finally, the court rejected Mr. Tobin's argument that the instructions of the Governors excused him from compliance with the subpoenas, holding in effect that the Governor's letters were actually the product of efforts to justify Mr. Tobin's own continuous position of noncompliance:¹³³

His role was thus more than that of an advisor, and the letters were a ratification of his position rather than a command to assume that position. When the letters are thus viewed, the Court concludes, refusal to obey the subpoena was wilful within the meaning of the statute.

Mr. Tobin promptly appealed his conviction and much time can yet be expected to elapse before a final judgment. Meanwhile the investigation is at a standstill. As to the responsibility for the heat that has been generated by the impasse, the expenditure of time and public funds, and the frustration of the investigative process, the

¹²⁸ *Id.* at 609.

¹²⁹ *Id.* at 612-613; see note 97 *supra*.

¹³⁰ *Id.* at 613.

¹³¹ *Id.* at 613; see also notes 62 and 77-82 *supra*.

¹³² *Id.* at 612 n. 114a.

¹³³ *Id.* at 615.

record speaks for itself. Temperately stated, the writer's own views conform to the ideas expressed in the following editorial which appeared in the *Washington Post* for June 18, 1961.¹³⁴

When the top officials of the Port of New York Authority defied the House of Representatives last year and were cited for contempt, this newspaper criticized them for "crying too soon." They had refused to yield documents sought by the House Judiciary Committee in a clearly authorized investigation of the Authority on the ground that the Committee was trying to expose and punish the Authority and to take over supervision of its operations. In the trial of the case Judge Luther W. Youngdahl found no such encroachment upon the prerogatives of the States of New York and New Jersey. He has upheld the contempt conviction of the Authority's executive director, Austin J. Tobin.

The purpose is not, of course, to punish Mr. Tobin. He has indicated that he will yield the requested documents if the courts finally hold that he should. The issue before the courts, for an ultimate appeal to the Supreme Court is anticipated, runs much deeper. What power does Congress have to inquire into the operations of a bi-state agency created with the consent and approval of Congress?

No doubt the Port Authority would have had a good case if the Judiciary Committee had actually attempted to dismiss or otherwise punish Port Authority personnel or to control its operations. But Judge Youngdahl could find no such treading upon forbidden ground. The investigation was undertaken to determine whether the Authority was functioning as Congress anticipated when it approved the compact 40 years ago and whether the congressional consent to the compact needed any alteration to protect the Federal interests. These are legitimate Federal aims which cannot be thwarted because some individuals in Congress might, on the basis of the investigating committee's findings, seek to invade the rights of the states in managing their bi-state agencies.

Well, the States of New York and New Jersey have a right to seek a review in the Supreme Court if they wish, but a prudent concern for the taxpayer might well suggest compliance with Judge Youngdahl's decision and postponement of any appeal until there is evidence of some real abuse of the congressional power over interstate compacts.

¹³⁴P. E4, col. 1.